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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

ALEJANDRO ALPIREZ,

Plaintiff,

-against-

WBB CONSTRUCTION, INC., 1107 BROADWAY LLC, 1107 BROADWAY MEZZ I LLC, 1107 BROADWAY MEZZ II LLC, TESSLER DEVELOPMENTS LLC, 200 FIFTH LLC and 200 FIFTH AVENUE ASSOCIATES L.L.C.,

Defendants.

INDEX NO. 106699/08

MOTION SEQ. NO. 005

WBB CONSTRUCTION, INC., 1107 BROADWAY LLC, 1107 BROADWAY MEZZ I LLC, 1107 BROADWAY MEZZ II LLC and TESSLER DEVELOPMENTS, LLC,

Third-Party Plaintiffs,

-against-

ALL WASTE INTERIORS, LLC,

Third-Party Defendant.

The following papers, numbered 1 to 4, were read on this motion by plaintiff for partial summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2, 3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on his causes of action for violations of Labor Law §§ 200, 240(1) and 241(6) asserted as against defendants WBB Construction, Inc. (WBB), 1107 Broadway LLC (1107), 1107 Broadway Mezz I LLC (Mezz I), 1107 Broadway Mezz II LLC (collectively, 1107 Broadway) and Tessler Developments LLC (Tessler) or, in the alternative, pursuant to CPLR 3126, striking the

answer of third-party defendant All Waste Interiors, LLC (All Waste) for spoliation of evidence.

BACKGROUND

According to the complaint, plaintiff, an employee of All Waste, was injured at a job site on February 11, 2008 while performing demolition work inside the premises known as 1107 Broadway, New York, New York. On the date of the accident, the premises were owned by 1107 Broadway and Tessler, and the general contractor/construction manager for the project was WBB (*see* Notice of Motion, exhibit. A). At the time of the occurrence, plaintiff and a co-worker, Gelber Perez (Perez), were performing demolition work on the 16th floor of the building, cutting a pipe near that floor's ceiling. Plaintiff and Perez were directed to perform this work by Michael Dally (Dally), All Waste's foreman, who instructed them to use a two-level scaffold with a height of approximately 12 feet, along with an electrical hand/chain saw in order to cut the pipe. Plaintiff and Perez placed a rope around the pipe in order to secure it, because, according to Perez, they had no other alternative (Perez EBT, at 35, 39, 40, 48-56).

As plaintiff was standing on the second level of the scaffold, cutting the pipe, the support that was holding the pipe to the ceiling gave way and the pipe swung down, striking the scaffold. This, in turn, caused the scaffold to shake and move and the pipe struck plaintiff on the right side of his head, causing plaintiff to fall off the scaffold (*id.* at 44-45, 56-57, 63-65, 74).

The scaffold that plaintiff and Perez were using was composed of metal pipes and was not attached to the wall, ground or ceiling (*id.* at 57, 74-76), nor did it have handrails or guardrails (plaintiff's EBT, at 33). According to plaintiff and Perez, the scaffold was not fully planked and one of the two planks on the scaffold, on the level where plaintiff was standing, fell when the pipe struck the scaffold which caused the scaffold to shake and move (Perez EBT, at 73-77; plaintiff EBT, at 33).

In support of his motion plaintiff attached the affidavit of Dally, who averred that:

"No entity or individual, including All Waste, WBB

> Construction, Inc, the owners of 1107 Broadway, and myself, ever provided Alejandro Alpirez or All Waste employees with any safety devices, aside from hard hats and goggles, prior to or at the time of Mr. Alpirez's fall from the scaffold.
> Safety harnesses and lanyards were not provided to Alejandro Alpirez or to any other All Waste employees at this job site on or prior to February 11, 2010, nor were Alejandro Alpirez or any other All Waste employees required or instructed to wear safety harnesses at this job site. Moreover, even if safety harnesses and lanyards had been provided, there was no safe anchorage point available to tie off a lanyard on the 16th floor" (*see* Notice of Motion, exhibit B).

Igor Mazler (Mazler), WBB's corporate representative, testified at his deposition that he was unaware of the training or instructions that All Waste employees received, that WBB and the premises' owners did not have a designated safety engineer for the project and that no safety meetings were ever held at the project (Mazler EBT, at 17-21). Further, Mazler said that he did not recall seeing any safety railings on the scaffold when he inspected the scaffold immediately after plaintiff's accident (*id.* at 41). According to Mazler, it was All Waste's responsibility to provide its workers with harnesses, and WBB did not provide any harnesses (*id.* at 48).

James Bonagura (Bonagura), All Waste's corporate representative, was also deposed in this matter and stated that he was in charge of everything for All Waste and that he never had any safety training (Bonagura EBT, at 31-32). Bonagura said that Dally was the project foreman and that he and Dally had weekly safety meetings, wherein he discussed workers' personal protective equipment and basic safety (*id.*). Bonagura averred that there were only eight safety harnesses for at least 20 All Waste employees at the job site, and that the harnesses were kept in a lock box (*id.* at 28-29). Bonagura testified that on occasions prior to the date of the accident, he saw plaintiff using a harness when he was on a scaffold and that workers were instructed on using harnesses at safety meetings (*id.* at 36-37).

Bonagura was not sure whether Dally gave the All Waste employees safety instructions (*id.* at 39). According to Bonagura, prior to the date of plaintiff's accident, there were no safety manuals, safety programs, safety training or safety classes provided to All Waste workers (*id.* at 58). A few days prior to plaintiff's accident, Bonagura recalled that there had been a safety meeting about torch work, but Bonagura said that he never spoke to plaintiff because plaintiff cannot speak English (*id.* at 34). Bonagura averred that all safety meetings were held in both English and Spanish with an All Waste bilingual truck driver providing the Spanish translation (*id.* at 26). However, Bonagura did say that Mazler had complained to him three times regarding the failure of All Waste employees to follow safety instructions. Specifically, Mazler complained once regarding a missing fire extinguisher and, twice about All Waste employees not wearing hard hats (*id.* at 24). Bonagura also said that the height of the 16th floor of the premises was higher than the other floors in the building and that plaintiff was never given any instructions on how to anchor the pipes on the 16th floor. According to Bonagura, plaintiff was given general instructions on anchoring pipes, regardless of ceiling height differentials (*id.* at 69).

Immediately following the accident, Manoucherhr Shahbazi (Shahbazi) of the Department of Buildings performed an investigation of the site and testified that the scaffold presented a dangerous situation because it lacked handrails and guardrails, was not fully planked and was unsecured (Shahbazi EBT, at 16, 19-22, 33-34, 40-42). Based on his investigation, Shahbazi issued a Notice of Violation and Hearing Report, which state that WBB violated the Administrative Code in failing to provide a secured, fully planked scaffold with handrails or guardrails (Notice of Motion, exhibit O). This report was affirmed at an administrative hearing on July 3, 2008 (Notice of Motion, exhibit P).

WBB's project manager, Joseph S. Fernandez (Fernandez), testified at his deposition that he investigated the scene following the accident and he did not notice any anchorage

whereat plaintiff could have tied off a lanyard had he been provided with one, and that he was unaware of any safety meetings having been held at the site or whether the scaffold had guardrails or handrails (Notice of Motion, exhibit Q).

Plaintiff also attaches in support of his motion an affidavit of Daniel M. Paine, C.S.E. who opined that, "with a reasonable degree of certainty as a Construction Safety and Fall Protection Expert, it is my position that Mr. Alpirez was not afforded proper protection to safeguard him from the elevation risks to which he was exposed on February 11, 2008, and that the absence of such protection was a substantial factor in the bringing about, and the proximate cause, of his injuries" (Notice of Motion, exhibit R). Plaintiff contends that all of the preceding supports his causes of action based on violations of Labor Law §§ 200, 240(1) and 241(6). Further, plaintiff maintains that his cause of action alleging a violation of Labor Law § 241 (6) is supported by his allegations of violations of sections 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-5.1, 23-5.3, 23-5.6 and 23-5.18 of the Industrial Code (*see* 12 NYCRR Par 23).

Lastly, in the alternative plaintiff requests that All Waste's answer be stricken because All Waste has failed to produce the minutes of the safety meetings which it was ordered to produce as part of the discovery process. All Waste's response to such demands was that the minutes could not be located.

In opposition to the instant motion, defendants claim that plaintiff was the sole proximate cause of his injuries because he was a recalcitrant worker who failed to use the protective devices provided for his safety. In support of this argument, defendants point to Bonagura's testimony, which states that there were eight safety harnesses at the job site on the day of the accident, although there were over 20 workers there as well, and that plaintiff was not using a harness at the time of the occurrence (*see* Bonagura EBT, at 93-94). Moreover, defendants assert that there is no evidence that they had any notice or knowledge of the fact that plaintiff failed to follow express instructions to use a safety harness.

All Waste has also provided opposition to the instant motion, arguing that the evidence indicates that Mazler only had to complain about safety on the job site three times before the date of plaintiff's accident, concerning the use of hard hats and a missing fire extinguisher, and that there was no instance in which he complained about a worker failing to use a harness when necessary. It is All Waste's contention that, since these were the only safety concerns voiced by Mazler, this constitutes proof that the job site was safe and that the workers were provided with all necessary safety equipment. All Waste also avers that the workers were instructed to use harnesses at the safety meetings, that the workers themselves put the scaffolds together when scaffolds had to be used, and that guardrails were available for all scaffolds (Bonagura EBT, at 52-59). In addition, All Waste states that, according to Bonagura, plaintiff could have attached a harness to the I-beam that was next to the pipe (*id.* at 59). The Court notes that All Waste has not argued against plaintiff's request that its answer be stricken for spoliation of evidence.

In reply, plaintiff claims that since he was struck by a falling object as well as falling off the scaffold, the use of a harness would not have stopped his being struck by the falling pipe. Further, plaintiff contends that the scaffold itself was not properly secured, as evidenced by his expert's opinion, thereby negating defendants' arguments regarding the harness. Moreover, plaintiff maintains that the administrative determination that the scaffold was deficient is binding on defendants.

In his reply plaintiff also claims that contrary to Bonagura's testimony that he could have tied a harness to the I-beam, plaintiff says that this conjecture is contradicted by his expert's opinion, who stated that the I-beam was not certified as a proper anchorage point and the scaffold itself was not secure (*see* Notice of Motion, exhibit R). Plaintiff also challenges the oppositions' assertions that safety meetings were held in which he was instructed about using harnesses. This assertion is contradicted by Dally's affidavit cited above and defendants have

failed to produce any meeting minutes to substantiate their allegations. Plaintiff also says that defendants are liable for his injuries, pursuant to Labor Law § 200, because they were aware of a dangerous condition at the job site (the unsecured pipe and scaffold), which they failed to correct. Lastly, plaintiff argues that All Waste's answer should be stricken because it spoliated evidence, the minutes of the safety meetings, which it was required to produce as part of the discovery process.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65

NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

That branch of plaintiff's motion seeking partial summary judgment on the issue of liability on his causes of action alleging a violation of Labor Law §§ 240(1) and 241(6) is granted.

Labor Law § 240(1)

Section 240(1) of the New York Labor Law states, in pertinent part:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

As stated by the Court of Appeals in *Rocovich v Consolidated Edison Company* (78 NY2d 509, 513 [1991]),

> "It is settled that section 240(1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240(1) *is nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Labor Law § 240(1) was designed to protect workers against elevation-related risks, including instances wherein a worker falls from a height or is struck by a falling object (*Narducci v Manhasset Bay Associates*, 96 NY2d 259 [2001]). "In order to prevail upon a claim pursuant

to Labor Law § 240(1), a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of his injuries" (*Zgoba v Easy Shopping Corp.*, 246 AD2d 539, 541 [2d Dept 1998]). A worker's negligence is irrelevant to the absolute liability of the owner and general contractor (*see Cosban v New York City Transit Authority*, 227 AD2d 160 [1st Dept 1996]). "Proximate cause is established as a matter of law by the undisputed fact that plaintiff fell off a scaffold without guardrails that would have prevented his fall" (*Crespo v Triad, Inc.*, 294 AD2d 145, 146 [1st Dept 2002]).

Defendants' only opposition to plaintiff's motion rests on their argument that plaintiff was a recalcitrant worker and that his accident was solely caused by his failure to use the safety equipment that was provided at the job site. However, in order for defendants to escape liability under this theory, they must evidence that safety devices were readily available at the work site, even though not in plaintiff's immediate vicinity, and that plaintiff knew that he was expected to use such devices but, for no good reason, decided not to do so (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]). In such instances, plaintiff's own negligence would be the proximate cause of his injury (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). In addition, a safety instruction given to the worker immediately before the accident, which the worker disobeyed, is a requirement of the recalcitrant worker defense (*see Vacca v Landau Indus.*, 5 AD3d 119 [1st Dept 2004]; *Jamil v Concourse Enters.*, 293 AD2d 271 [1st Dept 2002]).

There is no evidence that plaintiff was given an instruction to use a harness immediately before he started work, which he wilfully disobeyed. The only direct testimony that has been provided regarding the last safety instructions given to plaintiff before his accident averred that a safety meeting occurred several days previous to the occurrence at which the workers were given a briefing on torch safety.

"In the instant matter, we find no question that the recalcitrant worker defense is not

applicable since [defendants] failed to demonstrate the plaintiff had 'disobeyed an immediate instruction to use a harness or other actually available safety device'" (*Vacca v Landau Indus.*, 5 AD3d at 120 [internal citation omitted]; *see Jamil v Concourse Enters.*, 293 AD2d at 271; *Sanango v 200 E. 16th St. Hous. Corp.*, 290 AD2d 228 [1st Dept 2002]). In the case at bar, defendants only make vague conclusory statements that plaintiff had been instructed to use a harness at some time prior to his accident, which is too equivocal to support the recalcitrant worker defense (*Vacca v Landau Indus.*, 5 AD3d at 119).

Plaintiff also contends that his accident was caused by a falling object, the pipe, because there was no place for him to secure it except by means of the rope, which failed. This testimony of plaintiff and his co-worker is uncontradicted, and the Court finds that these testimonies are sufficient to support plaintiff's Labor Law § 240(1) cause of action (*see Kosavick v Tishman Constr. Corp. Of N.Y.*, 50 AD3d 287 [1st Dept 1995]). Based on the foregoing, the Court finds that plaintiff is entitled to summary judgment on the issue of liability on his Labor Law § 240(1) claim based on both a fall from a height and a falling object (*see Rzymski v Metropolitan Tower Life Ins. Co.*, 94 AD3d 629 [1st Dept 2012]).

Labor Law § 241(6)

Labor Law § 241(6) states:

> "Construction, excavation and demolition work. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> ***
>
> All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work,

except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

To prevail on a cause of action based on Labor Law § 241(6), a plaintiff must establish a violation of an applicable Industrial Code provision which sets forth a specific standard of conduct (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343 [1998]). However, while proof of a violation of a specific Industrial Code regulation is required to sustain an action under Labor Law § 241(6), such proof does not establish liability, and is merely evidence of negligence (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494 [1993]).

In the case at bar, Industrial Code section 23-1.5 cited by plaintiff has been found insufficient to support a cause of action based on a violation of Labor Law § 241(6) (*see Sihly v New York City Tr. Auth.,* 282 AD2d 337 [1st Dept 2001]). However, other Industrial Code provisions cited by plaintiff are sufficient to sustain this cause of action: 23-1.15 (*see Macedo v J.D. Posillico, Inc.,* 68 AD3d 508 [1st Dept 2009]; 23-1.7 (*see Whalen v City of New York,* 270 AD2d 340 [2d Dept 2000]; 23-1.16 (*see Fernandez v Stockbridge Homes, LLC,* 35 Misc 3d 1204[A], 2012 NY Slip Op 50553[U] [Sup Ct, NY County 2012]; 23-1.17 (*see Olshewitz v City of New York,* 59 AD3d 309 [1st Dept 2009]; 23-5.3 (*see Sopha v Combustion Eng'g,* 261 AD2d 911 [4th Dept 1999]; and 23-5.1 (*see Vergara v SS 133 W. 21, LLC,* 21 AD3d 279 [1st Dept 2005]); 23-5.18 (*see Parrales v Wonder Works Constr. Corp.,* 55 AD3d 579 [2d Dept 2008]).

Since neither defendants nor All Waste oppose the applicability of these provisions to plaintiff's Labor Law § 241(6) claim, but rest their oppositions on the recalcitrant worker defense, which has been found insufficient, the Court grants plaintiff's motion with respect to this cause of action, except as to Industrial Code section 23-1.5.

Labor Law § 200

The court denies the remainder of plaintiff's motion. Labor Law § 200 is the codification of the common-law duty to provide workers with a safe work environment, and its provisions

apply to owners, general contractors, and their agents (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d at 494). There are two distinct standards applicable to Labor Law § 200 cases, depending upon whether the accident is the result of a dangerous condition or whether the accident is the result of the means and methods used by the contractor to perform its work (*see e.g. McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.,* 41 AD3d 796 [2d Dept 2007]). When the accident arises from a dangerous condition, to sustain a cause of action for violation of Labor Law § 200, the injured worker must demonstrate that the defendant had actual or constructive knowledge of the unsafe condition that caused the accident and, under such theory, the defendant's supervision and control over the work being performed is irrelevant (*see Murphy v Columbia Univ.,* 4 AD3d 200 [1st Dept 2004]).

In the case at bar, plaintiff contends that his injuries were the result of an unsafe condition at the job site, to wit, the unsecured pipe and scaffold. To hold an owner or general contractor liable for allowing a dangerous condition to exist at a job site, the worker must produce evidence that the owner or general contractor either created the dangerous condition or had actual or constructive notice of such condition, and a reasonable amount of time in which to remedy the condition prior to the accident (*see generally Vella v One Bryant Park, LLC,* 90 AD3d 645 [2d Dept 2011]).

Plaintiff has failed to demonstrate that the conditions of which he now complains were either created by defendants or that defendants had notice of such conditions. Plaintiff's argument, consisting of one paragraph that is unsupported by any case law, is conclusory at best, and insufficient to support his cause of action based on a violation of Labor Law § 200 (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]). Hence, the Court denies this branch of plaintiff's motion.

Lastly, since the Court has granted the relief sought by plaintiff on his causes of action based on violations of Labor Law §§ 240(1) and 241(6), the Court denies as moot plaintiff's

request for alternate relief.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiff's motion seeking partial summary judgment on the issue of liability for his causes of action based on violations of Labor Law §§ 240 (1) and 241 (6) is granted, with the amount of damages to be determined at trial; and it is further,

ORDERED that the remainder of plaintiff's motion is denied; and it is further,

ORDERED that all parties are directed to appear on July 25, 2012 at 9:30 a.m. at New York County Supreme Court, Part 40, for jury selection; and it is further,

ORDERED that the plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: June 11, 2012

Paul Wooten J.S.C.